

Munroe, Inc. and Christ Pappas. Case 6–CA–29269

August 16, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN
AND TRUESDALE

On August 18, 1998, Administrative Law Judge Robert M. Schwarzbart issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.

The Respondent has excepted to the judge's findings that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging employee Christ Pappas because he threatened to and subsequently filed a grievance. For the reasons set forth below, we find merit in the Respondent's exceptions.

Employee Christ Pappas worked for the Respondent as a mechanic/fitter trainee. On about June 15, 1997,² Pappas completed 2000 hours at 80 percent of the contractual base pay rate and began to inquire about advancing to the next training level pursuant to the contract.³ Several times during the summer of 1997, Pappas asked his immediate supervisor, Tony Mulrone, if and when he was going to be evaluated for a raise. Mulrone re-

plied that Pappas would not be evaluated until the Inland Hood explosion door project on which Pappas was then working was completed.⁴ When Pappas expressed his frustration at the delay, Mulrone told Pappas that he had not only had problems with Pappas' workmanship, but also with Pappas' failure to get along with fellow employees.⁵ Mulrone also mentioned other problems he had with Pappas including his sometimes not being at his workstation.

Beginning July 1, Pappas spoke to his union steward, Edward W. Benning,⁶ on four occasions about filing a grievance.⁷ Each time, Benning told Pappas that he did not have the forms and that he would have to get them from the day-shift steward.

Mulrone left the Respondent's employ on August 22. Prior to his departure, Plant Manager Benning asked him to evaluate Pappas. Mulrone replied that since he could not say anything good about Pappas, he was not going to evaluate him. Mulrone testified that while he would not recommend that Pappas be discharged, he also could not recommend that he be promoted.

Subsequently, Plant Manager Benning observed Pappas' work and concluded that not only was Pappas' production minuscule but he "really did not know what he was doing." On September 2, Plant Manager Benning told Pappas he had not done anything the previous workday, that he was not going to coddle employees like Mulrone had, and that he would fire Pappas if he did not show him something soon. Pappas replied, "Give me my raise or fire me now because I'm going to file a grievance." Plant Manager Benning told Steward Benning, that Pappas did not leave him much choice.

Immediately after the conversation, Pappas went to Steward Benning and told Benning that he wanted grievance papers and wanted to file a grievance immediately. Once again Benning said he did not have the papers and would try to get them. Pappas did not obtain the griev-

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F. 2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² All dates hereafter refer to 1997.

³ The Respondent's training program is detailed in Article XX of the collective-bargaining agreement, which provides in relevant part:

A training program is established for the purpose of training qualified shop employees.

The Corporation will have the right to employ trainees from time to time at an entry-level position. The rates of pay for these trainees will be as follows:

1st level 2,000 hr. at 60 percent of base rate.
2nd level 2,000 hr. at 70 percent of base rate.
3rd level 2,000 hr. at 80 percent of base rate.
4th level 2,000 hr. at 90 percent of base rate.

Each trainee will be reviewed on a semi-annual basis. At which time, based on his performance and skill level, he will continue in the program or be terminated.

⁴ Plant Manager Edward D. Benning confirmed that, during June, when he asked Mulrone what the company should do about Pappas, Mulrone told him that he was going to use the Inland Hood project to evaluate Pappas.

⁵ Mulrone testified that his main problem with Pappas was Pappas' inability to work with other employees. Pappas, who was classified as a fitter, was supposed to work in tandem with a welder, but Mulrone found it "difficult to team him up with anybody with whom he could do an adequate job." According to Mulrone, he had discussed Pappas' difficulties in getting along with his fellow employees many times.

⁶ Edward W. Benning is the son of Plant Manager Edward D. Benning.

⁷ In 1995, Pappas received his only prior wage increase in ultimate response to a grievance he filed after he had completed 2000 work hours at the 70-percent rate. Since the plant had been shut down for economic reasons from February to December 1996, Pappas and other trainees were not evaluated for pay raises that year.

ance forms until the next day, September 3, when he went to the union hall.

Later in the day on September 8, Plant Manager Benning contacted the Respondent's controller Steven Zemba. He stated that he wanted to terminate Pappas because he was well below the skill level required to progress to the next level. After asking Benning if he was sure that he wanted to fire Pappas, Zemba directed him to supply documentation. Plant Manager Benning then prepared a single page memo setting forth the reasons why Pappas should be terminated. He listed Pappas' poor welding skills, his inability to read a blueprint, his problems working with other employees, and his poor work habits. He also stated that other employees resented working with Pappas. He subsequently submitted his recommendation to Zemba.⁸

On September 8, Pappas filed a grievance over his failure to be promoted.⁹ On September 18, Zemba discharged Pappas because of faulty workmanship, poor work quality, and his inability to work with fellow employees. Pappas was the first employee discharged under article XX of the contract.

The judge found that the General Counsel established a prima facie case that Pappas' statement of intent to file a grievance and his subsequent filing of the grievance triggered his termination. The judge further concluded that even though Pappas' work was unsatisfactory and that the Respondent had postponed Pappas' evaluation in an effort to save his job, the Respondent had failed to meet its burden under *Wright Line*¹⁰ of showing that it would have discharged Pappas when it did, absent the grievance. Accordingly, the judge concluded that the Respondent violated Section 8(a)(3) by terminating Pappas because he had expressed his intent to file a grievance and actually did.

Assuming arguendo that the General Counsel met his initial burden under *Wright Line*, we find, contrary to the judge, that the Respondent has met its burden of showing that it would have discharged Pappas when it did because of Pappas' poor work performance. It is clear that the Respondent was unhappy with Pappas' work and that he had not performed well enough to warrant a promotion when he completed 2000 work hours in June. Rather than terminate Pappas, as called for by the contract, be-

cause he had not attained the necessary skill level to advance, the Respondent decided to give Pappas another chance to prove himself by deferring his evaluation until the Inland Hood project he was working on was completed. Pappas, however, continued to perform at a substandard level. In fact, it was after being criticized on September 2, that Pappas issued his ultimatum to "give me a raise now or fire me because I'm going to file a grievance."

Article XX of the contract gave Pappas the right to be reviewed for a promotion after completing 2000 work hours and not an absolute right to be promoted. Thus, by threatening to file a grievance, Pappas was in effect requesting an immediate review of his performance. By insisting on an immediate evaluation, he rejected any further opportunity offered by the Respondent to prove himself.¹¹ Forced to evaluate Pappas, the Respondent made a determination consistent with its view expressed before the threat to file a grievance and the provisions of article XX that Pappas should be terminated for not meeting the required performance standard. We therefore find that the Respondent established Pappas was discharged because of his unsatisfactory work performance after he had rejected an opportunity by the Respondent to defer the evaluation and further prove his capability, and not because he threatened to and did file a grievance. Accordingly, we dismiss the complaint's allegations.

ORDER

The complaint is dismissed.

Suzanne C. McGinnis, Esq., for the Acting General Counsel.
Ronald J. Andrykovitch, Esq. (Cohen & Grigsby), of Pittsburgh, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT M. SCHWARZBART, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania, on a complaint issued pursuant to a charge filed by Christ Pappas, an individual.¹ The complaint alleges that Munroe, Inc., herein the Respondent or Company, violated Section 8(a)(1) and (3) of the

⁸ Although Benning did not give the documentation to Zemba until after Pappas filed his grievance, the judge found that Benning compiled the information based on his own observations and on past conversations with Mulroney before the grievance was filed.

⁹ The Union's business agent, Thomas J. O'Connor, had warned Pappas that the Respondent was not required to give him a raise and that termination could be one of the alternatives.

¹⁰ 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

¹¹ The judge suggests that, instead of terminating Pappas, the Respondent could have exercised its option of opposing his grievance on the merits. The judge overlooks, however, the fact that by evaluating Pappas' performance in response to the grievance, the Respondent was essentially finding the grievance meritorious. There is no dispute that Pappas had worked at least 2000 hours as a trainee at the third level and was entitled to be evaluated in order to determine if he would continue or be terminated. There is no contention that promotion was automatic under art. XX. As the judge found, the Respondent had the sole discretion to determine the promotion of its trainee/employees under art. XX.

¹ The relevant docket entries are as follows: The charge was filed on September 25, 1997, the complaint issued on January 2, 1998, and the hearing was held on February 26 and 27, 1998.

National Labor Relations Act (the Act), by discharging Pappas from his employment with the Respondent because he had filed a grievance protesting the Respondent's failure/refusal to grant him a pay increase in accordance with the terms of the collective-bargaining agreement in effect between the Respondent and International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Local 154, AFL-CIO, herein the Union, Pappas' bargaining representative. The Respondent, in its timely filed answer, denied the commission of unfair labor practices.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses and to file briefs. Briefs, filed by the General Counsel and the Respondent, have been carefully considered.²

On the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, was engaged in the fabrication of boilers and blast furnaces at its facility in Oakmont, Pennsylvania, from where, during the 12-month period ending August 31, 1997, it sold and shipped goods valued in excess of \$50,000 directly to points outside the Commonwealth of Pennsylvania. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

The Respondent, at its facilities in Oakmont, Pennsylvania, Youngstown, Ohio, and Ringold, Georgia, was engaged in producing components for boilers and blast furnaces for respective use in major power plants and steel mills. The Respondent's Oakmont plant, its sole location involved here, was its only unionized shop. At all relevant times, the Union was the bargaining representative of the Respondent's approximately 30 Oakmont production and maintenance employees. The parties' current collective-bargaining agreement covering those employees was effective from November 15, 1995, to October 31, 1999. The Respondent employs employees classified as welders, fitters, layout workers, and burners within this bargaining unit.

Article XX of the above collective-bargaining agreement, in relevant part, was as follows:

ARTICLE XX

Training Program

A training program is established for the purpose of training qualified shop employees.

The Corporation will have the right to employ trainees from time to time at an entry-level position. The rates of pay for these trainees will be as follows:

1st level 2,000 hr. at 60 percent of base rate.
2nd level 2,000 hr. at 70 percent of base rate.
3rd level 2,000 hr. at 80 percent of base rate.
4th level 2,000 hr. at 90 percent of base rate.

Each trainee will be reviewed on a semi-annual basis. At [sic] which time, based on his performance and skill level, he will continue in the program or be terminated.³

Upon the completion of 2,000 hours, each trainee will be reviewed again. If he has not attained a skill level required to progress, he will be terminated.

At no time will a trainee remain at a level beyond 2,000 hours.

The Company may at its discretion, progress an employee at a faster rate if the employee demonstrates that he has attained a higher level of proficiency.

* * * * *

Article VIII of the labor agreement, Adjustment of Disputes, provided for a three-step grievance procedure. The first two steps called for successive grievance meetings to be participated in by company and union officials who were at increasingly high levels within their respective organizations, while the last stage provided that where an alleged grievance was not adjusted satisfactorily at Step 2, "the matter may be submitted to arbitration."⁴

The Respondent's president was Philip F. Muck, its controller Steven E. Zemba, and the Oakmont plant manager was Edward D. Benning. Raymond C. Ventrone was the Union's business manager, Thomas J. O'Connor was the Union's president and business agent, while Edward W. Benning, the plant manager's son, was shop steward on Pappas' second shift⁵ at the Oakmont facility.

³ The General Counsel argues that the provision for trainee review on a semiannual basis, first added to the most recently negotiated collective-bargaining agreement, was obtained by the Union to counter the Respondent's practice of failing to evaluate its trainees at the time when they had completed the 2000 work hours at a given rate.

⁴ Contrary to the General Counsel's argument as to timing that Pappas' September 17 termination, in effect, had occurred on the tenth, or last, calendar day on which a first-step answer was due for his September 8 grievance, the language of Article VIII is more permissive both with respect to the strictness of the requirement as to when the grievance should be answered at the first step and the way in which the due date for the Company's response was to be counted. Article VIII provides only that "The employer shall make every effort to answer the grievance within ten (10) working days from when the grievance has been filed." Accordingly, the Respondent had had 10 working, not calendar, days to answer Pappas' grievance and, while compliance with that time frame certainly was encouraged, the language of the contract did not mandate response within such period.

⁵ Hereafter, Edward D. Benning will be referred to as Plant Manager Benning as distinguished from Edward W. Benning, herein Steward Benning. The complaint in this matter does not allege, the record does not indicate and I do not find, any cognizable legal irregularity based on their familial relationship. Rather, the undisputed evidence is that the two Bennings were not close. Steward Benning had not lived with his father since he was 10 years old. They spoke together at work about every 2 weeks and Steward Benning visited his father's home not more than about twice a year. Steward Benning had obtained his job with the Respondent without his father's help while the senior Benning was

² All dates are in 1997 unless otherwise indicated.

2. Pappas' termination

On about June 15, 1997, the Charging Party, Christ Pappas,⁶ a Respondent's trainee, who then had just completed 2000 hours at 80 percent of the contractual base rate for journeyman mechanics, began to inquire about advancing to the next trainee level of 90 percent, pursuant to Article XX, above, of the collective-bargaining agreement. As Article XX provided, the Respondent was to evaluate trainees after they had worked 2000 hours (the equivalent of 50 40 hour weeks) at which time the Company was to determine whether to advance them to the next higher level or to terminate them. As specified in Article XX, trainees could not continue at the same grade after reaching that point. They either were to be advanced or discharged.⁷

Pappas testified that, on about August 1, and on other occasions later that month when he still did not receive a pay increment, he asked his immediate supervisor, Tony Mulrone, about it. Mulrone replied that he would look into the matter and would speak to Plant Manager Benning.

On Tuesday, September 2, at approximately 4 or 5 p.m., Plant Manager Benning approached Pappas at his workstation shortly soon after the start of his second shift. As Pappas recalled, Benning told him that he "didn't get dick done Friday night."⁸ Pappas explained that he had left work early on Friday because he had been sick. Benning retorted that he "wasn't going to baby you guys like Tony (Mulrone) did."⁹ I'll fire you if you do not start showing me something soon." To this, Pappas replied, "Give me my raise or fire me now because I'm going to file a grievance." Benning mumbled something and walked away.

Plant Manager Benning's account was at least as blunt. He told Pappas to get off his "dead ass" and get something done; he was unhappy with Pappas' performance. Pappas answered that he was not getting any help from the welder; the welder was not doing his job. Benning could not recall if Pappas also had told him that he had gone home sick that preceding Friday night, but he did declare in response to proffered explanations

working in the field, away from the Respondent's facility, and had held his position there for about a month before his father knew that he was there. Plant Manager Benning testified that, earlier, when he had been steward, he "was business," and he expected his son to be the same way.

⁶ Pappas, employed by the Respondent as a mechanic/fitter trainee at the Oakmont facility since October 1993, worked the second shift under supervisor Thomas Anthony (Tony) Mulrone.

⁷ As will be considered in detail below, Pappas, whose job performance record was less than exemplary, had received his only prior wage increase in 1995, in ultimate response to a grievance he had filed on then completing 2000 work hours. Since the Oakmont plant had been shut down for economic reasons from February to December 1996, Pappas and the other trainees were not evaluated for pay raises that year.

⁸ As originally described by Pappas and others, this incident involving him and the plant manager occurred on Monday, September 1. However, it subsequently was realized that the plant was closed that Monday for Labor Day, and that Tuesday, September 2 was the first workday following the Friday referenced in that conversation.

⁹ Mulrone, Pappas' immediate supervisor during almost all of his time with the Respondent, had left the Respondent's employ on August 22, to take a position with another company.

that he did not want to hear any more of Pappas' "fucking excuses." Benning then left the area.

According to Benning, it was not until the day after this conversation, as he walked through the plant, that Pappas told him, "Either give me my raise now or fire me." Benning testified that he thereafter told Steward Benning that Pappas had not given him much choice.

Immediately after that conversation, Pappas went to Steward Benning, telling him that he wanted "grievance papers"; he wanted to file a grievance immediately. Benning, who in the past had told Pappas that he did not have grievance forms and was going to get them from the first-shift steward, again said that he did not have the forms and would try to get them. On the next day, Wednesday, September 3, Pappas went to the union hall and obtained the grievance forms from Union Business Agent Thomas J. O'Connor.

Pappas testified that when he arrived for work with the second shift on September 3, he already had filled out the grievance form. During that day, he gave it to Steward Benning declaring that he wanted to file this grievance "now." Benning replied that his father (the plant manager) was busy at the time, promising that he would file it the next day. Pappas asked why they could not do it then. Benning replied that his father was busy, that he would give it to him later and that, in the meanwhile, he would put the grievance in his (own) locker. Pappas reiterated his preference that Benning give the grievance to the plant manager then, noting that the grievance was dated, but Benning insisted that he would give it to his father later. Pappas saw Benning put the grievance in his locker.

Pappas related that Steward Benning thereafter did not return to the Oakmont facility until September 8, the Monday following the above September 3 conversation. However, when Pappas arrived at the locker room on September 8, he found the grievance that he had given to Benning lying ripped on the locker room floor. When Steward Benning came in, Pappas asked what was happening with his grievance. Pappas then showed Benning the torn grievance, telling him that he had found it on the floor. Again, Pappas asked what was going on. Benning replied that he did not know how Pappas' grievance had gotten onto the floor. Pappas declared that he wanted to refile the grievance. Benning reiterated that his dad then was busy in a meeting and that he did not want to bother him. Pappas told him, "Ed, I want to file this grievance now, I want it filed now." When Pappas persisted, Benning told him that his father had said that, if Pappas filed this grievance, he was going to fire him. Pappas' response was "Let's do it now, Ed." Benning replied that that was all right, if that is what he wanted to do. The grievance was filed on September 8.

Between September 8 and 17, Pappas had no conversations with Plant Manager Benning and did not experience any problems at work.

Pappas related that he first had spoken to Steward Benning about filing a grievance on about July 1, 1997, and that he had asked Benning for grievance forms about four times. On all four occasions, Steward Benning told Pappas that he did not have the forms; he was going to get them from Jim Ament, the day-shift shop steward. On at least two occasions, Benning had

asked Pappas if he was sure he wanted “to do this because my dad is going to fire you if you file this grievance.”

On finding his torn grievance on the locker room floor, Pappas went to see Union Business Agent O’Connor. At the union hall, Pappas told O’Connor that he needed grievance papers because he could not get them from the shop steward. According to Pappas, O’Connor, too, had asked if he was sure that he wanted to do this. There was no guarantee; the Company had a lot of competition, was trying to keep costs down, and it was up to Pappas if he wanted to file the grievance. Pappas simply told O’Connor to give him the grievance papers, ending the conversation.¹⁰

Mulroney¹¹ testified that when he left the Respondent’s employ on August 22, Pappas was working on an explosion door for a hood section on the Respondent’s Inland Hood project for Inland Steel. Mulroney assigned Pappas to this job during the preceding March when Pappas had told him that he wanted to do more complex work. Mulroney had replied that the Inland Hood project would be a good job for Pappas to test his skills. According to Mulroney, the explosion door project was considered “a little more complex” than some of the other work the Respondent did on hood sections. Mulroney originally had expected this project to last between 6 to 8 weeks, but it still was in progress when he left the Company in August. This was because the project had not had any time constraints and other jobs were given precedence. As related by Plant Manager Ben-

¹⁰ As O’Connor remembered, Pappas had visited him at the union hall on or before September 5, where they spoke privately. Pappas told O’Connor that he was at the 80-percent level in the training program at the Munroe shop; that he believed he had been wrongfully denied his progression in that training program; and that, since he had passed his 2000 hour mark without receiving a pay increase, he wanted to file a grievance to recoup. However, there were no grievance forms in the shop. O’Connor gave Pappas some blank grievance forms to complete at home. O’Connor also brought out the (contract) agreement book to explain that, under the collective-bargaining agreement, when making its 2000 hour evaluation of its employee-trainees, the Respondent had discretion to determine whether the employee was to be advanced or let go. Pappas replied that he was beyond his 2000 hours, that he had grieved this once before—not to O’Connor’s level—but that that grievance had been settled (in 1995) with him receiving a 10-percent increase from 70 to 80 percent of base rate. O’Connor told Pappas that, under the wording of the agreement, the Company did not have to give him a raise and, if he should force the Company into a situation where he either got the raise or was terminated, termination could be one of the alternatives. O’Connor pointed out that the Company really was giving Pappas more time to show what he could do; to enhance his capabilities. It could work either way for him. Pappas said that he still wanted to file the grievance. O’Connor answered that that would be no problem and showed him how to prepare the grievance, giving him tips as to how to make it more effective.

¹¹ Mulroney, who appeared as a General Counsel’s witness, had supervised Pappas for almost his entire time with the Respondent. As noted, Mulroney had left the Respondent’s employ about a month before Pappas’ termination. Although, as will be described, his assessment of Pappas’ work performance generally was negative, he had attempted to be helpful to, and even protective of, Pappas. Having severed his connections with the Respondent by the time of his testimony, Mulroney was a disinterested witness whose confident testimony was confirmed, as applicable, by documentary evidence. Accordingly, much weight is given to his account.

ning, the Inland Hood project finally was completed in mid-February 1998.

Mulroney recalled that Pappas’ initial job on the Inland Hood project, on which he worked as a fitter,¹² was to cut and prepare the tubular material to be installed on the fixture. Later on, Pappas installed the tubes directly onto the fixture with the aid of a welder, who worked with him. Before March, Pappas had worked on the cradle, a related operation used to load and ship finished product.

Mulroney related that on several occasions before his August 22 departure from the Respondent, Pappas had asked if and when he was going to turn in Pappas’ evaluation for his raise. Mulroney replied that he would look into it; that the Respondent was waiting until the project either was completed, or nearly completed, to really look into the matter; and that, although his 2000 hours had been completed, Pappas would not be evaluated until the project was completed. When Pappas expressed frustration with this delay, Mulroney told him that, besides his workmanship, he also had reservations about the way in which Pappas interacted with his fellow employees; his main problem with Pappas. Although Pappas was supposed to work in tandem with a welder, Mulroney found it “very difficult to team him up with anybody with whom he could do an adequate job.” Although Mulroney had tried to have Pappas work with different employees, he just did not get along with them. “Many times before the night was over,” Mulroney “would be refereeing between Pappas and the other employees.” This resulted in work not getting done. Mulroney testified that he had discussed Pappas’ difficulties in getting along with his fellow employees with him many times. On three occasions Steward Benning had been involved. Pappas’ basic response was that he never had a problem; it always was the other guy.

Other problems Mulroney had had with Pappas included his sometimes not being at his workstation. On one occasion, Mulroney had found Pappas sitting on a bench inside the restroom just doing nothing. When Mulroney spoke to Pappas about his being away from his work area, Pappas always had an excuse, such as that he was having a headache. Pappas also would run a piece of equipment without doing anything with it; just going through the motions, but not cutting into the material as he was supposed to be doing. Mulroney averred that he would let a string of such incidents go by and then put them all together to give Pappas more than one example of the problems he had been having with him.

Shortly after the plant-wide layoff ended in December 1996, Mulroney had asked Pappas to take a welding test since he had claimed an ability to weld in his job application. Pappas had declined to take this test, replying that he had no desire to weld; he just wanted to be a fitter. Accordingly, Pappas was classified as a fitter and, according to Mulroney, his inability to weld had played no part in his evaluation.

Mulroney testified that Pappas did have some talent from a technical standpoint. When Mulroney left the Respondent, he would not have recommended either that Pappas be terminated

¹² Pappas was one of two fitters assigned to the Inland Hood project. The other fitter was Lester Burford, who worked the first, or day shift. Both men were expected to perform essentially the same duties.

or promoted. Although Plant Manager Benning had asked that Mulroney do a written evaluation of Pappas before leaving, Mulroney did not comply with that request. Plant Manager Benning long had expressed dissatisfaction with Pappas' work to Mulroney because he had not felt that Pappas was producing enough and because of his problems in working with fellow employees. Mulroney did tell Benning that his unfavorable comparisons of Pappas to employee Lester Burford, whom Benning considered to be more productive at corresponding work on the first shift, was unfair. This was because, like Burford who had been moved to other assignments, Pappas, too, would do other tasks during his shift. Accordingly, Pappas might not have had any more time than Burford to do the work being used as bases for comparison.

Plant Manager Benning confirmed that when, in June 1997, he had asked Mulroney what was the Company to do with Pappas, Mulroney told him that he was going to give Pappas the explosion door job to work on to prove himself and that he would use that job to evaluate him.

The plant manager testified that on the same day, September 2, as he had reproved Pappas for his work, Dan King, the welder then assigned to work with Pappas, had asked to be taken off the explosion door job because he did not want Benning to evaluate him based on his performance while working with Pappas. Benning told him to do the best he could, but did not take him off that job.

Benning averred that while observing Pappas at work in August 1997, he concluded that Pappas "really did not know what he was doing." Pappas was following the same steps as employee Lester Burford who, on the first shift, was doing essentially the same work as Pappas was supposed to do on the second shift. Benning would reassign Burford for a couple of hours every day to load and unload trucks and to do other work unrelated to fitting in the hope that Pappas would show what he could do and pass Burford's deliberately-reduced production as a fitter. However, Pappas never did. Not only was Pappas' production minuscule, he also could not read blueprints. Other employees, principally fitter Tony Dudek, had told Benning that they were not accomplishing what they were supposed to because they were helping Pappas read prints.¹³

Benning testified that he began to compile information on Pappas after the above September 3 incident when Pappas, having been reprimanded, had told Benning to give him his raise immediately or to fire him. That same day, Benning also called the Respondent's controller, Zemba, describing the conversation he just had had with Pappas and advising that he was going to start compiling materials to terminate Pappas. Zemba told Benning to make sure that he had all the information down in black and white because their boss insisted that everything

be documented. He directed Benning to send the documentation to him. Accordingly, before Pappas actually had filed his September 8 pay grievance, based on his own observations and on conversations he had had with Mulroney before he left the Respondent's employ, Benning wrote the following comments concerning Pappas. He gave these to Zemba after Pappas' grievance was filed:

1. Claims to be a fitter, his fitting ability is that of an entry-level fitter with no improvement since he has been recalled.
2. When he runs into a problem on a job he does nothing. Due to his poor blueprint reading skills he can not come up with a solution.
3. He has a problem working with other men in the shop.
4. Other workers do not want to work with him because of his work habits. Because he cannot produce the expected amount of work during his shift it makes the welder assigned to work with him look bad.
5. The amount of rework needed to fix his errors results in a great loss of production time on the next shift.¹⁴

After Benning turned the above notes over to Zemba, he continued to compile information on Pappas' attendance record.

Zemba testified that on September 2, Plant Manager Benning called to advise him that he had an employee, Pappas, who was well below the skill level required to progress and that he wanted to initiate termination proceedings under Article XX of the contract. Zemba asked Benning why he wanted to do this and whether he could provide him with any supporting evidence to substantiate termination proceedings. Benning replied that "they" had been monitoring Pappas' progress on the Inland explosion door job, which had started in the spring of 1997. Pappas was the fitter on the second turn. Both Benning and Mulroney (when still there) were disappointed in the productivity and progress on that job. Zemba asked if Benning was certain that that was what he wanted to do, since the Company never had done that before.¹⁵ Benning answered that he felt strongly enough that this case merited termination. Zemba then directed Benning to supply him with written documentation to support the Respondent in terminating Pappas. According to Zemba, nothing was said about a grievance being part of this recommendation.

Several days later, Zemba received a single sheet of paper from Plant Manager Benning setting forth the above reasons why Pappas should be terminated. Zemba phoned Benning and they reviewed the points Benning had outlined, discussing at length the first item which noted that, although Pappas claimed

¹³ On cross-examination, Benning conceded that his actual opportunities to personally observe Pappas at work were quite limited. While his formal work day would end with the first shift at 4 p.m., he usually remained at the facility for another half hour, providing a 30-minute overlap with Pappas on the second shift. Also, Benning had been away from work from March to June 1997, because of illness. His opinions of Pappas were based on his reviews, while going through the entire shop at the start of his workday, of what had been accomplished the night before.

¹⁴ Contrary to Plant Manager Benning, Mulroney testified that while some of Pappas' work had to be redone, he did not consider this to be unusual for the complex work being performed. There were "many times" when Pappas had had to rework what had been done by other employees.

¹⁵ Before September 1997, the Respondent had not terminated any other employee under article XX. Also, although the Respondent had given employees with performance problems written warnings and time off, Pappas never had received a written warning or time off for performance or absentee problems.

to be a fitter, his fitting ability was that of an entry-level fitter with no improvement since he had been hired. Zemba, having looked at Pappas' personnel file, which showed that Pappas had been hired as a welder, asked Benning how did one go from being a welder to a fitter several years down the line. Benning explained that the Respondent had run a blind advertisement in the newspapers to which Pappas had responded, describing his capabilities as a welder. In 1995, when observing Pappas' weak welding skills, supervision then had thought of terminating him for that reason. That was when Pappas had informed Benning that he was not a welder but a fitter.

Benning further reported that Pappas had had trouble working with the other men. In response to Zemba's query, Benning declared that he had had terrible time trying to pair Pappas up with other men in the shop because they resented working with him. Finally, Benning reported that a tremendous amount of rework had to be done on the explosion door where Pappas was working, which partly was the reason why the job had taken much longer than had been estimated.

With this information, some of which had been factually challenged by Mulroney, Zemba again reviewed Pappas' personnel file and, within the next several days, informed Philip Muck, the Respondent's owner, about his conversations with Benning and Benning's memorandum concerning Pappas. He recommended that Muck proceed with the termination.

Zemba related that it was not until he received Pappas' September 8 grievance concerning his promotion that he learned that it had been filed. Zemba had received Benning's discharge recommendation before the grievance was filed and had recommended to Muck that Pappas be terminated several days after receiving Benning's memo.

Zemba went to the Oakmont plant on September 18 to personally terminate Pappas. There, at 4 p.m., he, Plant Manager Benning, first-and second-shift Shop Stewards Ament and Benning and Shop Clerk Dan King¹⁶ met with Pappas in the office. Zemba introduced himself to Pappas, telling him that this was an unfortunate way for them to meet but that, effective September 17, Pappas' employment was terminated. Zemba told Pappas that he was being discharged because of faulty workmanship, poor work quality, and his inability to work with his fellow employees. Pappas was informed that he had cost the Company much time and money through lost productivity and that he lacked the skills required to progress to the next level. Therefore, the Respondent was exercising its rights under Article XX of the contract to terminate him.

Pappas repeatedly asked Zemba to give him something in writing, which Zemba reiterated that he did not have to do. When Pappas persisted, Zemba asked Plant Manager Benning to photocopy the page of the contract containing Article XX. When Benning did so, Zemba initialed and handed the photocopied page to Pappas. The two shop stewards then accompanied Pappas to clean out his locker, after which Pappas left the premises. Pappas' pay to his termination date was forwarded to him along with any accrued vacation and benefits he may have been entitled to. According to Zemba, no mention was made

during that terminal meeting of the fact that Pappas had filed a grievance.

By letter, dated September 19, Union Business Manager Raymond C. Ventrone advised Pappas that the Union had completed its investigation of the September 8 grievance concerning his pay increase and had concluded that Article XX of the collective-bargaining agreement between the Union and the Respondent had not been violated. In accordance with Article XX, which the letter quoted in relevant part, the Respondent was not required to automatically award a 10-percent increase in wages upon an employee's attainment of 2000 hours and that it was within the Employer's discretion to advance trainees to the next skill level based on their performance. Accordingly, the Union regretfully had no alternative but to withdraw Pappas' grievance at that step of the grievance procedure.

Ventrone again, by October 6 letter, informed Pappas that he had completed his investigation of Pappas' second, September 22, grievance, which he had filed protesting his discharge. Ventrone noted that in a meeting with Zemba, he was informed that Pappas continually had been reprimanded for errors in workmanship and poor productivity and that, although he had represented himself in his resume as a welder, he later had informed the Company that he was a fitter. The Union felt that Pappas had been given every opportunity in the Trainee Program. The Union also found from its investigation, contrary to Pappas' contention supported by Mulroney, that there had been no supervision on the second shift, that a union foreman or company representative had been on duty at all times. Ventrone's letter noted that the Respondent, although rejecting his repeated requests to reconsider Pappas' termination, had exercised its right under Article XX to discharge him since, having completed 2000 hours, Pappas had not attained a skill level necessary to progress.¹⁷

¹⁷ O'Connor testified that he had investigated both of Pappas' grievances. The first grievance, relating to Pappas' promotion, was looked into by telephone. However, in checking out Pappas' grievance concerning his discharge, O'Connor interviewed Pappas and talked to approximately 12 of his fellow employees outside of the Respondent's premises as they left work. The Union had tried to get work for Pappas but, in order for him to get onto the Union's referral list for the more lucrative outside construction work, Pappas would have to pass a common arc welding test and would have to take standardized safety training and a drug test. While with the Respondent, Pappas had performed inside, or shop, construction. Although O'Connor had urged Pappas to take courses at the Union-operated school which provided training in reading blueprints, iron working, carpentry, and boiler making, work which union members did in the field, Pappas did not take advantage of this offer.

After being told during the discharge investigation that Pappas had filed a grievance for having been terminated under the training program, none of the 12 employees to whom O'Connor had spoken expressed a view that Pappas should have been promoted. One employee, Tony Dudek, informed O'Connor that he had tried to work with and help Pappas, but that Pappas had known it all and was his own worst enemy. During that visit, Steward Benning advised O'Connor that Pappas had been given the job of putting in a small door, had been given the relevant blueprints and told to do it. This was a limited-scope project that had to be done within the next few days. Either nothing was done, or it was not done correctly.

¹⁶ The Respondent employed two different employees named Dan King during the relevant period—the shop clerk and a welder.

3. Steward Benning's testimony

Steward Benning testified that, on September 3, Pappas approached him when he arrived at work. Pappas announced that he had filled out this grievance paper and would like him to file it.¹⁸ Steward Benning said fine, but told Pappas that he could not file it that day. He would make copies of it and would bring it in the next day. Benning related that the grievance happened to become torn while he was working on a job away from the Respondent's facility in response to a company request made to him later on the evening of September 3. As he was leaving that night, Benning had placed the grievance on the locker room table with all of his clothes so that he would not forget it. However, the grievance form had found its way to the floor. When Benning got home that night, he did not notice that he did not have the grievance. He thereafter worked for the rest of that week in Latrobe, Pennsylvania. During that time, Benning was not certain whether he had left the grievance in his locker or had dropped it in his car.

When Pappas showed him the torn grievance on his return to the Respondent's premises the next Monday, Benning told Pappas that he had put his grievance on the locker room table so that he would not forget to take it but must have forgotten to do so. He apologized to Pappas, reassuring him that it had not been intentional. Pappas produced another grievance, declaring that he wanted to file it that day. Benning said fine, but they could not do it at that minute because the Company was having a production meeting in the shop. As soon as that meeting ended, they would go to the plant manager and submit the grievance.

Benning explained that, in the past, when he had obtained grievance forms, he would "run" off about 20 copies, which he would give out in about 2 days, such was the demand. At the time in question, Ament, the daylight (first-shift) steward, from whom Benning usually obtained his grievance forms had been out sick, so Benning had had a hard time getting additional forms. By the time Benning could get new forms, Pappas already had obtained them from the union hall, located 10–15 miles from the Respondent's facility. While it would have been possible for Benning to have gotten them from the hall himself, since the day steward had kept a supply in his locked locker, Benning had not felt a need to go there. While he might have been more prompt about getting the grievance forms, other things were going on.

Steward Benning testified that he did tell Pappas that his father had said that, if Pappas filed the grievance, he probably would be fired. Benning had told Pappas that, if he forced his father's hand, Pappas would be discharged because he was not performing the duties required of a fitter. After Pappas filed his grievance, Benning had investigated it by asking his father why Pappas was not getting his raise. His father was the only com-

pany official Benning could talk to about this since Mulroney already had left the Company and there was no second-shift supervisor. When the steward told him that Pappas had filed a grievance over the raise, Plant Manager Benning said, "Let him." Plant Manager Benning showed Steward Benning Pappas' attendance record, which indicated that Pappas had left early every payday. Pappas' resume also had contained Pappas' representation that he could do certain types of welding which, in fact, he could not. Plant Manager Benning had not been happy with Pappas' job performance.

According to Benning, the respective daylight or night-shift supervisors initiated raises under Article XX of the contract by sending their written recommendations to management. The decisions as to whether to grant the raises thereafter were made by the Respondent's president, Muck. It is undisputed that, until Pappas, no employee ever had been discharged under Article XX.

Benning further related that on the day that Pappas filed his pay grievance, he spoke with Business Agent O'Connor who told Benning that he already had talked to Pappas. He informed Benning that, if Pappas wanted to file a grievance, he should let him do so; he could not tell a man not to file a grievance. It might not be in Pappas' best interest to submit one, but he had to let him file it. Benning advised O'Connor that he never had told Pappas not to file the grievance, he just had thought that Pappas would have been better off by not doing so.

Benning averred that completion of 2000 hours did not always immediately result in a decision as to whether to progress or terminate an employee. About 90 percent of the Respondent's trainees were not evaluated on time. In quite a few instances, if the Company was not happy with an employee's job performance, the employee would be advised of this dissatisfaction and told that the Respondent did not consider the employee to be ready for a pay increase. As with Pappas, such an employee would be informed that if his performance on a certain job improved, he then would be evaluated for a raise. Employees who were so notified usually would put forth effort and get their raises. However, they would not be promoted after completing 2000 hours, but when the Company felt that they had progressed sufficiently.¹⁹

4. Pappas' 1995 grievance and grievances filed by other employees

On December 8, 1995, Pappas had filed an earlier, ultimately successful, grievance concerning his pay raise under the Article XX training program. Having been hired at 70 percent of journeyman scale, the favorable outcome of this grievance had resulted in his being raised to the 80 percent level where he was at the time of his 1997 grievance and discharge. Since, as noted, he been on layoff with the rest of the employee complement during most of 1996, Pappas did not complete the 2000

¹⁸ Pappas earlier had told Benning that he had put in his 2000 hours, that he felt that he was due a raise and that, accordingly, he was going to file a grievance. When he spoke with his boss (Mulroney), he was told that his raise was going to depend on how he performed on the explosion door job. Steward Benning was told this by both Mulroney and by Pappas. The September 3 grievance was the first one that Pappas had asked Steward Benning to file in 1997 on the raise issue.

¹⁹ Although not all trainees were advanced after putting in 2000 work hours, the record shows that certain employees with whose progress the Respondent had been satisfied received timely promotions and that the Respondent had exercised its Article XX right to move up at least one individual deemed particularly deserving to the full scale rate before he completed 2000 hours at the 90-percent level.

hours requisite for his next evaluation under that provision of Article XX until June 1997.

Pappas testified that the earlier promotion process had begun in September or October 1995, when he reminded Mulroney that he had completed 2000 work hours at the 70-percent stage 1 or 2 weeks before. Mulroney replied that he would look into it and speak to Plant Manager Benning. Pappas told Mulroney that if he did not get his raise, he would file a grievance.

After a 2-week pay period had passed, Pappas reiterated to Mulroney that he had his 2000 hours and asked about his raise. Mulroney once more stated that he would look into it, that he had to talk to Benning and that he had to write a letter to management at the main office. Pappas reiterated that if he did not get his raise, he would file a grievance.

After another pay period had passed, Pappas again prodded Mulroney who repeated that he would look into it. Pappas also informed the then-steward, Ed Kachinko, that he would file a grievance if the pay increase was not contained in his next paycheck. When the raise was not in his paycheck 2 weeks later, Pappas filed his December 1995 grievance. The raise was included in Pappas' next paycheck, the Respondent having acceded to the grievance. As Pappas recalled, no one from management ever had discussed with him the Employer's decision to grant that 1995 wage increase.

Mulroney, who had been Pappas' immediate supervisor since about the end of his probationary period, testified that in 1995, he too, had had concerns about Pappas' work performance. In Mulroney's December 18, 1995, memorandum to Zemba regarding Pappas' grievance, he noted that for up to 6 weeks before acquiring his 2000 hours, Pappas' performance had been lackluster. At Mulroney's prompting, Pappas had shown more initiative both in fitting and welding, but Mulroney still had problems concerning his continuing incompatibility with certain employees. While attempting to give Pappas the "benefit of the doubt" by recommending his advancement to the next level, such advancement would be "generous in lieu of the fact that termination could have been an alternative." Mulroney's memo noted that Pappas was of the opinion that a promotion should be granted solely on accumulating 2000 hours and that if Pappas "had demonstrated more desire to improve his skills during the course of the year, he would have been granted a raise in more timely fashion." Mulroney's memorandum concluded by noting that "retroactivity should not be a consideration." On this recommendation, Pappas was awarded his 1995 wage increment and, as the Respondent indicates, was not penalized for having grieved the matter.²⁰

Mulroney related that employees Russell J. Schantz and Scott D. Stowers also had filed nonmeritorious grievances about not being promoted at precisely 2000 hours without being terminated for having done so. Stowers, later having admitted to the commission of a punishable offense unrelated to his hav-

ing filed a grievance, was given the opportunity to resign from the Company with a generic recommendation. Mulroney averred that, through the years, other employees also had filed grievances for different reasons and that none were terminated or discriminated against for having done so. This testimony was corroborated by Steward Benning who related that he had processed many grievances. Benning recalled that employees Jim Haze and Greg Cunningham, after completing 2000 hours, had successfully filed respective grievances for 2 weeks retroactive pay when, contrary to what had been promised, they had not received such increments at the expected times.

B. Discussion and Conclusions

As noted by Administrative Law Judge Raymond J. Green in his Board-approved decision in *Jersey Central Power & Light Co.*:²¹

... the Board has consistently held that an employer violates Section 8(a)(1) of the Act when it discharges an employee who, in good faith, files a contractual grievance even when the grievance is on his own behalf and does not concern other employees. . . .

Further, the Board has held that the discharge of an employee will violate the Act irrespective of whether the employee's contractual claim is found to be meritorious. Indeed, any contrary result would . . . tend to vitiate the enforceability of labor contracts as it would tend to discourage the filing of grievances by employees. For if, under this Act, the filing of a grievance will only be protected if the grievance has merit, it may be assumed that few employees would be willing to take such a gamble. Therefore, unless employees feel free to file grievances, the collective bargaining agreement would, in effect, be unenforceable.

In the present matter, violation of the Act is proved should the General Counsel make a prima facie case that Pappas was terminated for having filed a grievance, in this case concerning his promotion pay, and if the Respondent does not establish that it would have discharged him in the absence of that grievance.²²

Here, Pappas, at his own request, was assigned by Mulroney in March 1997, to work on the Inland Hood explosion door project, which, Mulroney described as a "little more complex" than some of the other work that the Respondent did on hood sections. In mid-June, Pappas completed 2000 work hours at his rate of 80 percent of journeyman mechanic's basic pay and, under the terms of Article XX of the effective collective-bargaining agreement, his next evaluation had become due. Mulroney testified that, on several occasions during the summer of 1997 when Pappas had asked if and when Mulroney was going to turn in his evaluation, he, inter alia, had told Pappas that, although his 2000 hour evaluation was past due, he would

²⁰ Contrary to Pappas' testimony that, when he had informed Mulroney in 1995 that he would file a grievance if he did not receive his pay raise, Mulroney did not tell him that his work performance was a reason for his not having received it, I credit Mulroney's account that, before the 1995 evaluation, he had spoken to Pappas more than six times about issues affecting his work.

²¹ 269 NLRB 886, 888 (1984). In *Jersey Central Power & Light Co.*, supra, the there-alleged discriminatee's discharge was found to have been precipitated by his mere announcement of an intention to file a grievance while, here, such a statement of intent not only was made but fulfilled.

²² *The Zack Co.*, 278 NLRB 958 (1986).

not be rated until the Inland Hood project on which Pappas then was working was completed. Plant Manager Benning confirmed that, during that June, when he had asked Mulroney what the Company should do about Pappas, Mulroney told him that he was going to give Pappas the explosion door job to work on to prove himself and that he would use that job to evaluate him. Steward Benning, too, had heard from both Mulroney and Pappas that Pappas' raise was going to depend on how he performed on the explosion door project. Accordingly, while Pappas never agreed to the arrangement, it is factually undisputed that the Respondent, after not having evaluated Pappas for promotion in June on his completion of 2000 work hours as specified in Article XX, had announced its decision to defer such assessment until completion of the Inland Hood explosion door project. Although this explosion door project, still on-going in late August, obviously was taking longer than the 6 to 8 weeks Mulroney had estimated for its completion during the preceding March when he put Pappas on it, there is no evidence that the fact that this job still was in progress at that time had changed the Respondent's decision to withhold Pappas' evaluation until the Inland Hood task was finally finished. Accordingly, since the Inland Hood explosion door project ultimately was not completed until mid-February 1998, from the Respondent's stated intent prior to September 2, absent the disputed discharge, Pappas reasonably could have remained in his job with the Company for what ultimately turned out to be approximately 5 months past his September 17 termination date before being evaluated for his next pay increment. While, as the General Counsel points out, Article XX of the labor agreement also provided for semiannual employee evaluations under the Respondent's training program, that process was not a factor in determining whether unlawful conduct occurred in this matter. Since the language relating to semi-annual review had been newly added to the most recent collective-bargaining agreement, the parties had not paid attention to it. Pappas' relevant grievance was based solely on his not having been evaluated after 2000 work hours and no reference ever was made to semiannual review by Pappas, the Union's representatives or the Respondent.

I find that the General Counsel has established a *prima facie* case that Pappas' September 2 statement of intent to file a grievance concerning his wage increase, and his filing of that grievance on September 8, triggered his termination on September 17. The General Counsel, as noted, has shown that Pappas, in the absence of that grievance, reasonably could have expected to continue in the Respondent's employ until the Inland Hood project on which he had been working was completed before again being evaluated; that the Respondent's failure to evaluate Pappas when he had completed 2000 work hours at his current pay level was inconsistent with the relevant language of the collective-bargaining agreement; that the Respondent never before had terminated a trainee under Article XX of the contract; that, unlike other employees whose job performance had been at issue, Pappas previously never received a written warning or had been given time off; that between Plant Manager Benning's September 2 criticism of Pappas' work performance and his termination 15 days later, Pappas had had no other work-related incidents which would

have further invoked the Respondent's displeasure; and that all substantive measures taken by the Respondent to discharge Pappas originated from the September 2 conversation when Pappas, responding to Benning's criticism, told the plant manager to give him his raise or fire him immediately because he was going to file a grievance. The record shows that Benning had then phoned Zemba at once to recommend Pappas' termination and began his written compilation of information concerning Pappas to support that recommendation. Zemba ultimately pursued this with Company President Muck. As noted, all this resulted in an abrupt change in the Respondent's previously announced plan to defer Pappas' evaluation to the completion of his current project. Although, as Benning and Mulroney both testified, Benning long had been dissatisfied with Pappas' work, it was not until September 2, that Benning had been motivated to put anything in writing about Pappas or to no longer tolerate his performance on the job.

As to whether Pappas actually had told Benning on September 2, that he would file a grievance if he did not receive his raise immediately, Benning, contrary to Pappas, averred that he only had heard Pappas tell him to give him his raise or fire him then. Benning did not say that he also had heard Pappas state that he would file a grievance. While Pappas generally was not an impressive witness, I credit his testimony that he had told Benning on that occasion that he would file a grievance if his raise was not granted because such declaration would have been consistent with his pattern of conduct. The record shows that he had made a like statement of intent to Mulroney and did file a grievance when his raise was delayed in 1995; that he had been talking to Steward Benning about filing a grievance concerning his 1997 pay raise since August 1; and that, when that steward still could not provide a grievance form after the plant manager had criticized him on September 2, Pappas went to the union hall himself to obtain the necessary grievance forms. Pappas had not been subtle about his use of the contractual grievance procedure. It had been his way of successfully obtaining his 1995 pay increase and, if necessary, it was going to be his means of getting his next raise in 1997. Since the filing of a grievance was so much a part of Pappas' methodology for dealing with his pay-raise problem on September 2, and so conformed to what he previously had said and done in his efforts to receive promotion in 1995 and 1997, I find that when, on September 2, Pappas told the plant manager to give him his raise or to fire him, he also told Benning that if he did not receive his raise, he would file a grievance.

Even if it were to be found, consistent with Benning's account of their September 2 conversation, that Pappas had not specifically threatened to file a grievance, but merely had registered the protest described by Benning, that Pappas should be given his raise or be fired immediately, the Respondent's actions taken in response thereto still would have been violative of the Act. As noted by the U. S. Supreme Court in *NLRB. v. City Disposal Systems, Inc.*:²³

In practice, however, there is unlikely to be a bright-line distinction between an incipient grievance [and] a

²³ 465 U.S. 822 (1984).

complaint to an employer. . . . It is reasonable to expect that an employee's first response to a situation that he believes violates his collective bargaining agreement will be a protest to his employer. . . . Thus, for a variety of reasons, an employee's initial statement to an employer to the effect that he believes a collectively bargained right is being violated. . . . might serve as both a natural prelude to, and an efficient substitute for, the filing of a formal grievance (bracketed word added).

Noting that Pappas' September 2 statement to Plant Manager Benning that he would file a grievance if he did not immediately receive what, in his view, was his overdue pay raise, set in motion the activities of the Respondent's officials which led directly to Pappas' discharge; that the Respondent had become abruptly unwilling to tolerate Pappas' long-standing job difficulties; and that these factors had resulted in the prompt abandonment of the Respondent's previously-announced plan not to evaluate Pappas until work on the Inland Hood explosion door project was completed, I conclude for additional reasons set forth below that the Respondent has failed to meet its burden under *Wright Line*²⁴ of showing that it would have discharged Pappas when it did even if he had not stated his intent to file the grievance here and, thereafter, had not done so.

In agreement with the General Counsel, the Respondent had been free to evaluate and, if deemed appropriate, to terminate Pappas under the labor contract either when he completed 2000 work hours in June, or when his semi-annual review became due. Even apart from these evaluating opportunities, the Employer, having received the grievance, still had had valid recourse. Besides promptly terminating Pappas, there had been the option of opposing his grievance on the merits, as it saw them, through the various steps of the already-invoked contractual grievance procedure. The Respondent, however, could not lawfully terminate Pappas when it did for having filed a grievance asserting his right to the timely evaluation or pay raise he had not been given under Article XX of the collective-bargaining agreement.

It would not be correct to argue that there was no violation in this matter since Pappas ultimately received at least some of what he had seemed to be trying for through the grievance process—an earlier evaluation than he otherwise would be getting. As this argument goes, since his value as an employee had been assessed in response to his grievance, he was properly terminated because the Employer, in valid exercise of its discretion,²⁵ had found that Pappas' skills did not warrant his promotion to the next pay level. Such premise is invalid because the record shows that Pappas' evaluation, to the extent that it was given, had no procedural separateness but was merely an intrinsic part of the push to terminate found unlawful here.

That the Respondent, as it argues, had no across-the-board history of discharging, or otherwise discriminating against, its

employees for filing grievances, which situation earlier had benefited Pappas and other employees, does not conclusively preclude the finding here that it had taken reprisal against Pappas in 1997 for his stated intention to pursue, and actual use of, the grievance procedure.²⁶

In finding the violation here, essentially that Pappas' September 8 grievance, and the preceding threat to file same, had accelerated his termination and/or made it inevitable,²⁷ I note the Respondent's uncertainty that his job performance to that time would have supported the merits of his September 8 grievance. Although his former immediate supervisor, Mulroney, had tried to help him and, as noted, had been protective, Mulroney's assessment of Pappas' job performance never was better than tepid. Mulroney's difficulties with Pappas, from his inability to get along with his fellow workers, particularly the welders with whom he was required to work closely, to his slacking off, to his poor production, to his inability to read blueprints, to his failure to perform as a welder after advertising that skill to induce his hire, and to his refusal to accept responsibility when criticized, were factors in making his 1995 raise through the grievance process so difficult. All of these problems continued to persist during his 1997 evaluation period. While, as the General Counsel argues, Mulroney was not prepared to recommend that Pappas be discharged at the time of his August 22 resignation from the Respondent, Mulroney, at the same time, also was not prepared to recommend that Pappas be advanced. In the "up or out" language of Article XX, a supervisor's unwillingness to recommend that a trainee be promoted was tantamount to advocating discharge.

Consistent with the above observations concerning Pappas' job performance, I accept the Respondent's argument that its decision to defer Pappas' evaluation for his next pay raise from June to the completion of his then-current job had been beneficially intended in order to give him additional time to prove himself. The evidence puts at issue whether Pappas would have qualified had he been rated in June. Accordingly, I do not reject the Respondent's argument that the postponement of Pappas' evaluation had been an effort to save his job. As Mulroney certified, Pappas did have his problems at work and Benning long had complained to Mulroney about him. Benning began his September 2 criticism of Pappas before Pappas had mentioned the prospect of filing a grievance to him. Without Mulroney's protective mantle and evidence that Pappas had developed some readiness to accept responsibility for performance defects called to his attention, it is not clear that Pappas' grievance, had it been processed through the relevant contractual procedure, would have been sustained.

What is clear, however, is that the Company, for whatever reasons, had not responded by utilizing the invoked grievance procedure in dealing with Pappas. Rather, the record shows that

²⁴ 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (C.A. 1 1981), *cert. denied* 455 U.S. 989 (1982), approved in *Transportation Management Corp.*, 462 U.S. 393 (1983).

²⁵ The record shows that the Union has recognized the Respondent's sole discretion to determine the promotion of its trainee/employees under Article XX.

²⁶ *Allegheny Ludlum Corp.*, 320 NLRB 484 497 (1995), *enfd.* in relevant part 104 F.3d 1354 (D.C. Cir. 1997).

²⁷ There is no basis for presuming that, had Pappas been given additional time to work on the Inland Hood project, he, like other similarly treated employees described by Steward Benning, would not have improved his performance sufficiently to receive a favorable evaluation. In any event, his accelerated termination precluded that possibility.

his statement that he would file a grievance, and his actual filing of same, had promptly triggered his termination. Accordingly, while the Respondent, for reasons set forth above merited certain equities in this matter, these were outweighed by its extraordinary and unprecedented reaction to Pappas' use of the grievance procedure. The effect of the Respondent's conduct was to discourage its employees from making further use of that contractual process.²⁸

Although Pappas was not an exemplary employee, as in *United States Postal Service*,²⁹ and *Jersey Central Power & Light Co.*³⁰ the Respondent, as noted, had tolerated his work and, from all pronouncements until then, had been prepared to defer his evaluation until the completion of his current project.³¹ Even more than in *United States Postal Service*, supra, which noted a 1-week period, here, there is no evidence of any performance-related event during the 2 weeks preceding Pappas' discharge that otherwise could have motivated the Respondent's action.

²⁸ The Respondent's failure to timely evaluate other employees, as well, does not enhance perceptions of a willingness to adhere to its contractual commitments. In the present matter, contrary to the Respondent, the found violation is not based, without more, on violation of the collective-bargaining agreement or on contractual dispute, but on the settled principle that the Board can interpret and resolve contractual matters incident to unfair labor practice disputes. As the Supreme Court noted in *C & C Plywood*, 385 U.S. 421 (1967), "... a contractual defense does not divest the Labor Board of jurisdiction." Nothing in this decision challenges the Respondent's discretionary right, recognized by the Union, to substantively determine the qualifications of its trainees for promotion or termination under Article XX of the contract. The finding here simply is that its employees may not be discharged for pursuing their contractual rights through the grievance procedure.

²⁹ 275 NLRB 510, 511 (1985).

³⁰ 269 NLRB, supra, at 888. Although the discriminatee in *Jersey Central Power* had had a bad attitude towards his employment, the Respondent in that matter initially had decided to refrain from taking any action concerning him in the hope that his attitude would improve. As was there determined, this approach similarly had lasted until that employee's subsequent declaration that he was going to file a grievance.

³¹ Also see *Black Magic Resources*, 312 NLRB 667, 672 (1993).

For the above reasons, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating Pappas on September 17, 1997, because he had expressed his intention on September 2, to file a grievance, and actually did so on September 8. As noted from above-cited authority, it is not prerequisite to the conclusions reached here that Pappas' grievance concerning his pay raise have merit or that his job performance have been exemplary.

CONCLUSIONS OF LAW

1. The Respondent is, and at all times material here has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is, and at all times material here has been, a labor organization within the meaning of Section 2(5) of the Act.

3. By unlawfully discharging its employee, Christ Pappas, the Respondent violated Section 8(a)(1) and (3) of the Act

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Christ Pappas, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*,³² plus interest as computed in *New Horizons for the Retarded*.³³

Additionally, the Respondent should be required to expunge from its files any reference to Pappas' discharge and notify him in writing when this has been done and that the evidence of this unlawful termination will not be used as a basis for future personnel actions against him.

[Recommended Order omitted from publication.]

³² 90 NLRB 289 (1950).

³³ 283 NLRB 1173 (1987).